SUPREME COURT OF FLORIDA

INQUIRY CONCERNING
A JUDGE, NO. 00-319,
JOSEPH P. BAKER
_____/

Supreme Court No.: SC00-2510

MOTION FOR REHEARING OR CLARIFICATION

Amy Mashburn, ethics professor at the University of Florida law school, testified at the JQC hearing that the modern trend in courts of this country has been to give judges greater authority to independently inform themselves. She testified this was especially true on scientific matter as in the Frye and Daubert rules adopted in most states, including Florida. The ground rules for judges to educate and inform themselves, she said, are in Federal Rule of Evidence 201. It requires judges to disclose the technical information obtained and allow response from counsel. She said following FRE 201 as a guide, as Judge Baker did, avoided any problem with Canon 3B(7). That is because information that was disclosed was not "outside the presence of the parties." FRE 201 prevents any questions of due process. She testified that interpreting Canon 3B(7) to prohibit all communications, even those disclosed to counsel, would make the rule unworkable. Every commentator who has considered this question agrees with her, as cited in the briefs. There is no authority in American jurisprudence holding judicial conduct improper where a judge has made prompt

disclosure of information learned regarding a case and allowing response from attorneys.

Professor Mashburn agreed with Judge Charles Scott. He testified the inquiries made by Judge Baker were necessary to understand how legal principles of contract damages could be applied to computer programs.

Thus, they were inquiries as part of extensive legal research done by Judge Baker and fall within the exception of Canon 3B(7)(b) for obtaining "the advice of a disinterested expert on the law" if the judge gives "notice to the parties" and "affords the parties reasonable opportunity to respond." Judge Baker delivered a lengthy draft during trial showing all of his legal research including his inquiries on computer programming and discussed his research on several occasions with counsel in court. He postponed ruling for four months after disclosing his research and inquiries, but Judge Baker never heard a comment on the inquiries he disclosed until 18 months later when he read the Fifth DCA opinion.

Obviously, judges cannot be completely ignorant on technical subjects that come up in court. Judges learn things relevant to pending cases in continuing judicial education, in similar cases, from reading and education, news media, from friends and relatives. The message the opinion of this court will send judges is that nondisclosure is the only way to avoid admonishment.

This case is a first in Anglo-American history holding that disclosure by a judge of information the judge has and giving counsel an opportunity to be heard on it is a violation of judicial canons. It will be contrary to the trend of every court in the country to give judges independence to vet evidence and arguments made to them. This court should not send such a message and should reconsider its decision.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the a copy of the foregoing has been furnished by U.S. Mail delivery to *Judge James Jorgenson*, Chairman of JQC Hearing Panel, The Historic Capitol, Room 102, Tallahassee, FL 32399-60000; *Thomas C. MacDonald, Jr., Esquire*, General Counsel to JQC, 100 N. Tampa Street, Suite 2100, Tampa, FL 33602; *Brooke S. Kennerly*, Executive Director, Florida JQC, 400 S. Monroe, Old Capitol, Room 102, Tallahassee, FL 32399; *John R. Beranek, Esquire*, Counsel to the JQC Hearing Panel, P.O. Box 391, Tallahassee, FL 32302-0391; and *Charles P. Pillans III, Esquire*, The Bedell Building, 101 East Adams Street, Jacksonville, FL 32202, this 1st day of March, 2002.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that I have complied with the font requirement and used 14-point Times New Roman.

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